

## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to the universal service fund mechanism established in NUSF-26.	)	Application No. NUSF-50
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In the Matter of the Commission, on its own motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act.	)	Application No. NUSF-4
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### Post-Hearing Brief of The Rural Independent Companies

#### I. Introduction

The Rural Independent Companies (the “Companies”)<sup>1</sup> hereby submit this post-hearing brief in the above-referenced dockets. The Companies appreciate the opportunity to respond to the evidence presented at the hearings conducted in this proceeding on November 8 and 9, 2006.

The issues that the Companies will address in this Post-Hearing Brief are as follows:

- (1) Whether the Permanent NUSF mechanism established by the Commission’s Findings and Conclusions in Application No. NUSF-26 dated November 3, 2004,<sup>2</sup> if adjusted as proposed in the Order entered herein on August 29, 2006,<sup>3</sup> would satisfy the requirements of *Neb. Rev. Stat.* § 86-323(5) that such mechanism be “specific, sufficient and predictable.”
- (2) Whether the NUSF surcharge percentage should be revised by the Commission pursuant to *Neb. Rev. Stat.* § 86-328 from 5.75% to 6.95% of assessable revenues effective January 1, 2007.

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<sup>1</sup> The Companies are: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K & M Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom Inc., and Three River Telco.

<sup>2</sup> *In the Matter of the Nebraska Public Service Commission, on its own Motion, seeking to establish a long-term universal service funding mechanism*, Application No. NUSF-26, Findings and Conclusions (Nov. 3, 2004) (the “NUSF-26 Order”).

<sup>3</sup> *In the Matter of the Nebraska Public Service Commission, on its own Motion seeking to make adjustments to the universal service fund mechanism established in NUSF-26*, Application No. NUSF-50, Order (Aug. 29, 2006) (the “NUSF-50 Proposal”).

- (3) Whether the proposal to increase the local service benchmark to \$17.95 per month for urban consumers and to \$19.95 per month for rural consumers is consistent with the affordability and comparability requirements of *Neb. Rev. Stat. § 86-328(3)*.
- (4) Whether the proposal to reduce the state earnings level from 12% to 11.25% is fair, just and reasonable in light of the evidence introduced into the record in these dockets.
- (5) Whether the proposal to impute Federal universal service fund payments to the calculation of Nebraska ETCs' earnings for the purpose of computing NUSF support payments is consistent with the requirements of the *NUSF-26 Order*.

**II. Implementation of the adjustments to the *NUSF-26 Order* set forth in the *NUSF-50 Proposal* would violate the requirement of Section 86-323(5) that there should be a “specific, predictable, sufficient” NUSF mechanism.**

**A. The Legal Context of the *NUSF-50 Proposal***

In *Neb. Rev. Stat. § 86-323* (2004 Cum. Sup.) the Legislature declared that the policy of this State is “to preserve and advance universal service” and to do so based upon the “principles” set forth in such statutory section. Among such principles is the following:

(5) There should be *specific, predictable, sufficient, and competitively neutral mechanisms* to preserve and advance universal service. . . . The distribution of universal service funds should encourage the continued development and maintenance of telecommunications infrastructure. (emphasis added)

The evidence in the record demonstrates that there is a broad consensus that the terms “specific,” “predictable,” and particularly the term “sufficient” are not defined in the Nebraska Telecommunications Universal Service Fund Act (“NTUSFA”),<sup>4</sup> are not defined in any rule or regulation promulgated by this Commission or in any Commission order, and have not been judicially interpreted by any Nebraska court.<sup>5</sup>

The language of the statute is clear that each of the terms “specific”, “predictable” and “sufficient” modify the word “mechanisms”. In construing a statute, it is necessary to determine

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<sup>4</sup> *Neb. Rev. Stat. §§86-316 - 86-329* (2004 Cum. Sup.).

<sup>5</sup> See, e.g., Testimony of Dr. David I Rosenbaum T. 36:18-38:20 and Exhibit 14, 2:6-26, Reply Testimony of Ken Pfister.

and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary and popular sense. *McCray v. Neb. State Patrol*, 270 Neb. 225, 701 N.W.2d 349 (2005). Further, it is necessary that a reasonable construction be placed on a statute which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Salts v. Lancaster County*, 269 Neb. 948, 697 N.W.2d 289 (2005).

The “mechanism” in question is the NUSF High Cost Program, the operation of which was moved from transitional status to permanent status by virtue of the *NUSF-26 Order*. This conclusion is self-evident from the caption of Application No. NUSF-50 which references “the universal service fund *mechanism* established in NUSF-26.” (emphasis added) In the *NUSF-26 Order* the Commission expressly found that the methodology for the permanent High Cost Program “is specific, sufficient and predictable consistent with Neb. Rev. Stat. § 86-323.”<sup>6</sup> The Commission must determine in this proceeding whether the modifications to the *NUSF-26 Order* proposed in the *NUSF-50 Proposal* conform to the principles of specificity, predictability and sufficiency required in Section 86-323(5).

B. The *NUSF-50 Proposal* fails to meet the “sufficiency” requirement of Section 86-323(5).

Staff Economist, Dr. Rosenbaum, concurred that the Commission found the baseline High Cost Program support to be sufficient in its *NUSF-26 Order*.<sup>7</sup> Dr. Rosenbaum offered his opinion that in light of such finding, the Commission could only conclude that the baseline High Cost Program is insufficient if evidence were presented by a company to rebut such finding of

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<sup>6</sup> *NUSF-26 Order* at para. 11.

<sup>7</sup> T. 37:20-38:14, citing *NUSF-26 Order*, paras. 11 and 12.

sufficiency – and in Dr. Rosenbaum’s opinion, such evidence has not been presented in these dockets.<sup>8</sup>

Appendix A to the *NUSF-50 Proposal* states that the baseline High Cost Program is proposed to be reduced by \$6,787,857 on a flash cut basis from 2006 to 2007. Appendix A further describes total reductions created by proposed changes to the High Cost Program of \$23,380,959 from 2006 to 2007 – a reduction in total available High Cost Program support of over 30%.

There is no basis for Dr. Rosenbaum’s creation of a “rebuttable presumption” that the High Cost Program must be viewed as sufficient unless a company proves otherwise. Section 86-323(5) establishes the principle that mechanisms should be sufficient. Section 86-324(1) requires that high-cost support be “explicit and sufficient”. The Legislature created an affirmative duty for the Commission to maintain a sufficient mechanism. It is neither legally nor logically supportable to suggest that the Commission’s finding of sufficiency in the *NUSF-26 Order* in November 2004 based upon total support of \$73,975,173 in 2005 (as shown in the document “NUSF\_26\_Distribution\_05\_01\_20\_PublicVersion.xls” posted on the Commission’s web site January 20, 2005) and total support of \$71,787,021 in 2006 (as shown in Appendix A of the *NUSF-50 Proposal*) continues to be valid in the context of proposed total support of \$44,719,292 in 2007 unless one or more companies can prove such reduced support is insufficient. This is particularly the case since no definition of “sufficient” exists for which a company could offer evidence to rebut this supposed presumption.

Further, Mr. Pursley’s testimony is in conflict with Dr. Rosenbaum’s testimony in this regard. Mr. Pursley opined that it is the Commission’s burden to first establish sufficiency in the funding mechanisms:

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<sup>8</sup> T. 75:21-77:7.

Q. So is it fair to say then at least initially it's – the burden is on the commission to establish sufficiency?

A. [Mr. Pursley] With respect to universal service, it is.<sup>9</sup>

The reductions in NUSF support provided by the High Cost Program, as outlined in the *NUSF-50 Proposal*, were not based on a determination as to whether the resulting level of such support would be sufficient. Rather, the proposed funding level for 2007 of \$44.7 million was, in the words of NUSF Director Pursley, “based on what the fund could sustain at the current surcharge level.”<sup>10</sup> A witness for Embarq, as well as a witness for the Companies, offered testimony that the reductions embodied in the *NUSF-50 Proposal* would cause the High Cost Program to be insufficient.<sup>11</sup>

There is no basis for creation of a “rebuttable presumption” that the High Cost Program is sufficient unless insufficiency is proven. Further, the record does not contain evidence that supports a conclusion that the High Cost Program would, consistent with the Commission’s finding in the *NUSF-26 Order*, remain sufficient if the reductions proposed in Appendix A to the *NUSF-50 Proposal* are approved.

C. The *NUSF-50 Proposal* fails to meet the “predictability” requirement of Section 86-323(5).

As stated above, Section 86-323(5) not only requires the High Cost Program mechanism to be sufficient, but also to be predictable. Dr. Rosenbaum’s testimony did not address whether the proposed changes advocated in the *NUSF-50 Proposal* would meet the statutory requirement of predictability. NUSF Director Pursley testified that, in his opinion, “predictability is a

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<sup>9</sup> *Transcript Vol. I*, at 135:5-9.

<sup>10</sup> T. 212:20-24.

<sup>11</sup> *See*, Ex. 18, Testimony of Mark D. Harper, 3:5-4:4; Ex. 14, Direct Testimony of Ken Pfister, 6:9-35.

guarantee to the telephone user that they will have telephone service.”<sup>12</sup> This viewpoint fails to focus on the mechanism, as is required by Section 86-323(5), but rather focuses on the overall policy of the NTUSFA to preserve and advance universal service. The Companies believe that Mr. Pursley’s view of the meaning of predictability is inconsistent with the requirements and the language of Section 86-323(5). This belief was confirmed in cross-examination of Mr. Pursley during which he agreed that “predictability goes – yes, it goes to the mechanisms. I conclude that’s what the statute reads.”<sup>13</sup>

A reduction in the High Cost Program of more than 34% in one year on a flash cut basis does not comport with the predictability requirement of Section 86-323(5). Mr. Pfister testified that a prudent owner of a Nebraska ETC would be unable to make significant long-term capital expenditure commitments in the face of the uncertainty created by the *NUSF-50 Proposal*. The Permanent High Cost Program mechanism was created by the *NUSF-26 Order* in November 2004. To implement the changes in the *NUSF-50 Proposal* in 2007 would cause the program to lack predictability. The following example was presented during the cross-examination of Mr. Pursley at the hearing to demonstrate this conclusion:

Q. Mr. Pursley, you would agree with me a factor in deciding whether something is predictable or not is whether generally you can count on it occurring; correct?

A. Yes.

Q. Okay. Let me use Mr. Hendricks’ corn farmer example. Let’s assume I’m a corn farmer and I announce to my employees effective January 1 I’m going to establish a long-term permanent compensation system whereby if you work an entire month, at the end of the month, I’m going to pay you. You with me so far?

A. Uh-huh.

Q. So employees work January, last day of January, and I pay them. Employees work February, last day of February I pay them. Employees work March, March comes to an end and I say, well, I need to change it. Would you agree with me that that hampers whether that system is predictable any longer?

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<sup>12</sup> T. 127:13-15.

<sup>13</sup> T. 136:2-6.

A. Yes, to the people that it was charged with being predictable to.<sup>14</sup>

The Nebraska ETCs count on the consistent provision of NUSF support at the levels approved by the Commission in the *NUSF-26 Order* just as the farm hands relied on receiving wages in the foregoing example. To remove or change either the NETCs' NUSF support or the farm hands' wages renders the compensation system unpredictable. In the NTUSFA, the Legislature specified that the mechanism providing NUSF support should be predictable. The *NUSF-50 Proposal* is contrary to this requirement, and as such, cannot be approved by the Commission consistent with the requirements of the NTUSFA.

D. The *NUSF-50 Proposal* fails to meet the "specificity" requirement of Section 86-323(5).

The third requirement of the NUSF support mechanism pursuant to Section 86-323(5) is that it be specific. In his Reply Testimony, NUSF Director Pursley described a test that would be applied to determine whether a carrier is properly entitled to additional support: "If a company is found to be below the sufficient level, then some additional cost recovery may be warranted."<sup>15</sup>

In further discussion to identify the standards that would be applied to determine additional cost recovery, Mr. Pursley testified that "we would look at all sources of revenue and look at the ability of that company to continue to be financially viable and attract capital."<sup>16</sup> This review under the *NUSF-50 Proposal* is proposed to be entirely on a company-by-company basis without any specific standards applicable to all carriers. As Mr. Pursley further stated: "[Y]ou

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<sup>14</sup> T. 196:9-197:5.

<sup>15</sup> Ex. 5, 5:1-2.

<sup>16</sup> T. 117:24-118:6.

have to look at that on a case-by-case basis and it's not going to be a one-size fits all, that you have to look at the individual circumstances of every company as we move forward.”<sup>17</sup>

Black's Law Dictionary defines “specific” as “precisely formulated or restricted; definite; explicit; of an exact or particular nature.” The approach to determining High Cost Program support described by Mr. Pursley is diametrically opposite to this definition. As such, the *NUSF-50 Proposal* is further contrary to the requirements that the statute imposes upon the NUSF mechanism.

In summary, the *NUSF-50 Proposal* fails to satisfy the Legislature's requirement as expressed in Section 86-323(5) that “[t]here should be *specific, predictable, sufficient, and competitively neutral mechanisms* to preserve and advance universal service.” (emphasis added) As a consequence of this failure, an alternative resolution to the current imbalance between NUSF contributions and NUSF support payments must be formulated. The remainder of this Post-Hearing Brief will be focused on identification of such an alternative resolution.

**III. The NUSF surcharge percentage should be revised by the Commission pursuant to *Neb. Rev. Stat. § 86-328* from 5.75% to 6.95% of assessable revenues effective January 1, 2007.**

In the Commission's June 27, 2006 Order Setting Surcharge, NUSF Director Pursley was instructed “to notify the Commission prior to 90 days before the date that the NUSF balance is projected to be less than fifteen million dollars for the purpose of allowing sufficient time for the Commission to take action, if needed, on an emergency basis, to make any needed adjustments to the fund pursuant to *Neb. Rev. Stat. § 86-328*.”<sup>18</sup> Notification was provided to the Commission

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<sup>17</sup> T. 123:7-13.

<sup>18</sup> *In the Matter of the Commission, on its own Motion, seeking to determine the level of the fund necessary to carry out the Nebraska Telecommunications Universal Service Fund Act, effective fiscal year beginning July 1, 2006*, Application No. NUSF-4, Order Setting Surcharge at p. 2 (June 27, 2006).



by Mr. Pursley earlier this fall, and he testified at the hearing on these dockets that the current circumstance concerning the NUSF “certainly equates to emergency.”<sup>19</sup>

Without exception, all parties presenting testimony at the hearing on this matter recommended that the Commission reinstate the NUSF surcharge to its 6.95% level that existed prior to October 1, 2005. Mr. Pursley endorsed the recommendations of the NUSF Advisory Board that the surcharge be “increased to at least 6.25% . . . . with a recommended surcharge level range of 6.25% to 6.95% in your deliberations.”<sup>20</sup> The Companies’ witnesses, Ms. Vanicek and Mr. Pfister, both recommended restoring the NUSF surcharge to 6.95%.<sup>21</sup> Embarq’s economics expert, Dr. Brian K Staihr, not only recommended that the surcharge be restored to 6.95%, but further, testified that to do so would result in an increase in charges of only between \$0.35 and \$0.45 per month for Embarq’s customers.<sup>22</sup> With regard to the impact of such a change, Dr. Staihr testified:

I can tell you with certainty that returning the surcharge to its previous level will not adversely affect the consumers in Nebraska. And I look forward to questions on that topic.<sup>23</sup>

Frontier Communications of Nebraska’s witness, David Ruhland, testified that while his Company had initially supported maintaining the surcharge at 5.75%, “we do recognize that it might be necessary to increase the surcharge if other adjustments can’t be made.”<sup>24</sup> Similarly, Qwest’s witness, Peter Copeland, testified that Qwest favors returning the surcharge to the

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<sup>19</sup> T. 141:9-142:9.

<sup>20</sup> See, Ex. 2 and T. 132:24-133:6.

<sup>21</sup> T 286:6-287:18 and T. 323:17-324:11.

<sup>22</sup> T. 337:21-338:9. Embarq’s second witness, Mark D. Harper, also testified in favor of returning the surcharge to 6.95%. T. 346:19-347:4.

<sup>23</sup> T. 337:15-19.

<sup>24</sup> T. 359:1-3.

former level of 6.95%.<sup>25</sup> Finally, the witness for the Rural Telecommunications Coalition of Nebraska, Kevin Kelly, testified as follows regarding the NUSF surcharge level:

Finally, RTCN enjoins [sic] with many other parties in this proceeding in encouraging the commission to increase the NUSF surcharge. This action would enable the commission to continue to maintain a sufficient Nebraska Universal Service Fund as required by Nebraska Statute.<sup>26</sup>

As stated at the outset of this section of the Post-Hearing Brief, the evidence before the Commission uniformly supports action to restore the NUSF surcharge to 6.95%, and to do so on an emergency basis effective January 1, 2007.

**IV. The proposal to increase the local service benchmark to \$17.95 per month for urban consumers and to \$19.95 per month for rural consumers is inconsistent with the affordability and comparability requirements of *Neb. Rev. Stat. § 86-328(3)*.**

The *NUSF-50 Proposal* relating to the rural local service benchmark mechanism is flawed in that it is contrary to the comparability and affordability requirements of the NTUSFA.<sup>27</sup> Additionally, adoption of this aspect of the *NUSF-50 Proposal* would deprive rural LECs in the State of the ability to obtain Rural Utility Service (“RUS”) lending at preferred interest rates.

According to the testimony of the Companies’ economist, Sue Vanicek, the current monthly rate for Nebraska consumers served by rural companies is \$28.28, inclusive of taxes and surcharges. The proposed increase of \$2.00 per month would push this total above \$30 per month in comparison to a national average rate for urban areas of \$24.74 per month.<sup>28</sup> The *NUSF-50 Proposal* to establish a rural benchmark that is \$2.00 per month greater than the urban

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<sup>25</sup> T. 371:8-14.

<sup>26</sup> T. 397:19-25.

<sup>27</sup> *Neb. Rev. Stat. § 86-317* (2004 Cum. Sup.).

<sup>28</sup> T. 293:17-25.

benchmark could create a local rate differential based only upon the carrier serving the customer.<sup>29</sup> Ms. Vanicek offered the example that a rural LEC such as Hershey Telephone Cooperative would need to increase its rates by \$1.51 per month to make up for the explicit reduction in NUSF support due to the proposed rural benchmark mechanism, while Qwest would be required to increase its monthly rate by only \$.31.<sup>30</sup> In her Reply Testimony, Ms. Vanicek presented a more detailed explanation of the reasons why the proposed differential in the rural and urban local service benchmarks violates the comparability requirement.<sup>31</sup>

In addition, many rural LECs in Nebraska have obtained financing through the RUS. Loan documentation utilized by RUS requires that an RUS lender shall implement tariff provisions that do not include mileage or zone charges. The Companies recommend to the Commission that it not take action with regard to the rural benchmark that would jeopardize the opportunity of Nebraska's rural LECs to obtain RUS financing.<sup>32</sup>

In summary, the Companies oppose an increase in the local service benchmark, as well as the creation of different urban and rural benchmark mechanisms, as contained in the *NUSF-50 Proposal*.

**V. The proposal to reduce the state earnings level from 12% to 11.25% is not fair, just and reasonable and is not supported by the record in these dockets.**

A significant amount of evidence was introduced into the record with regard to the aspect of the *NUSF-50 Proposal* that would reduce the state earnings level from 12% to 11.25% for Nebraska ETCs. For the reasons stated below, the Companies believe that such evidence, taken

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<sup>29</sup> T. 295:8-12.

<sup>30</sup> T. 295:13-19.

<sup>31</sup> Ex. 13, 6:1-36.

<sup>32</sup> See generally, Ex. 13, 7:4-42.

as a whole, supports a finding that the existing 12% level should not be decreased, but rather should be *increased*. However, as further set forth below, the Companies recommend that, based on the totality of circumstances that bear upon the High Cost Program at this time, the Commission should, at a minimum, reaffirm the 12% state earnings level.

The 12% state earnings level was established for the High Cost Program in the Commission's Findings and Conclusions in Application No. C-1628 entered on January 13, 1999.<sup>33</sup> This level was approved for continued use in the *NUSF-26 Order*.<sup>34</sup> Thus, the 12% level has been in use for nearly 8 years in connection with the High Cost Program. During this time period it is a generally accepted fact that the risks associated with the provision of telecommunications service in rural areas have increased.

Commission Staff Economist Dr. Rosenbaum recognized the correlation between risk and expected return on investment when he testified:

Markets compensate investors for taking risks. The more risks associated with an investment the greater the return an investor would expect in order to undertake that risk.<sup>35</sup>

In questioning Dr. Rosenbaum, Commissioner Landis observed that there is greater risk today for the operations of Nebraska ETCs than five years ago due to uncertainties in connection with Federal USF programs. Dr. Rosenbaum agreed with this statement.<sup>36</sup> Further, Dr. Rosenbaum

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<sup>33</sup> *In the Matter of the Application of the Nebraska Public Service Commission, on its own Motion, seeking to conduct an investigation into intrastate access charge reform*, Application No. C-1628, p. 7 (Jan. 13, 1999).

<sup>34</sup> *NUSF-26 Order*, paras. 61 and 84.

<sup>35</sup> T. 17:4-8.

<sup>36</sup> T. 32:16-33:4.

testified that Nebraska ETCs are not public monopolies today and that there is either actual or potential competition in the areas served by such companies.<sup>37</sup>

The other two economists who offered testimony, Dr. Staihr and Ms. Vanicek, both testified that there is currently more risk associated with the businesses of local exchange carriers than in the past. Ms. Vanicek testified that “the risks associated with the operation of local exchange carriers have increased in recent years.”<sup>38</sup> Dr. Staihr testified:

My point here is that in terms of competition and the marketplace, ILECs are, to be blunt, in a really bad situation with regard to their competitors. As such, they represent a riskier investment to an investor. As such, they require a higher return.<sup>39</sup>

The testimony in the record presented by economists is consistent in its demonstration that the risks associated with operation of a Nebraska ETC local exchange carrier have increased since the Commission established the state earning level of 12%, and it is a basic tenet of economics that as risk increases, the rate of return expected by the marketplace also increases.

A further point that must be made in connection with the *NUSF-50 Proposal* to reduce the state earnings level to 11.25% is that the statement contained therein that “[t]he 11.25 earnings benchmark mirrors the authorized federal rate of return benchmark”<sup>40</sup> is inapt, in that comparing the federal and state rates amounts to comparing “apples with oranges.” Ms. Vanicek explained the state and federal rate of return levels as follows:

The federal rate of return of 11.25 percent is used by the FCC to set rates such that carriers are guaranteed to receive this return on their investment and expense base. On the other hand, the 12 percent rate of return set by the Commission

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<sup>37</sup> T. 44:18-45:4.

<sup>38</sup> T. 296:11-13.

<sup>39</sup> T. 341:12-17.

<sup>40</sup> *NUSF-50 Proposal* at para. 12.

serves as a maximum amount or a cap on earnings that are allowed for carriers participating in the NUSF.

Because carriers bear the risk of earning less than the rate of return cap, it is appropriate that a capped rate be higher than a guaranteed rate.<sup>41</sup>

NUSF Director Pursley agreed that the federal 11.25% rate of return was designed to allow carriers to realize, as a general matter, the 11.25% return on rate base while the Nebraska rate of return level of 12% is a cap or limitation on earnings.<sup>42</sup>

The net result of the difference between the structure underlying the federal rate of return of 11.25% and the Nebraska rate of return level of 12% is, as Ms. Vanicek testified, that there is greater risk to Nebraska ETCs that the Nebraska earnings limitation of 12% will not be realized. Consequently, due to this increased level of risk, the 12% earnings cap should, in accordance with accepted economic principles, be increased and not decreased as set forth in the *NUSF-50 Proposal*. Notwithstanding the foregoing evidence in the record, the Companies support maintaining the current 12% state earnings level without further increase at this time.

**VI. Imputation of Federal universal service fund payments to the calculation of Nebraska ETCs' earnings for the purpose of computing NUSF support payments should be limited to 75% of Federal High-Cost Loop Support.**

As set forth in the *NUSF-50 Proposal*, Federal USF support from the High-Cost Loop Fund, Interstate Access Support ("IAS"), Interstate Common Line Support ("ICLS") and Local Switching Support ("LSS") would be imputed to the calculation of a Nebraska ETC's support under the High Cost Program.<sup>43</sup> Currently, a rural carrier's Federal High-Cost Loop

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<sup>41</sup>T. 295:23-296:10.

<sup>42</sup> T. 115:15-117:8.

<sup>43</sup> T. 153:2-8.

support is required to be reported on the NUSF-EARN form and 75% of that support is allocated to the intrastate jurisdiction.<sup>44</sup>

During his testimony, Mr. Ruhland, Frontier of Nebraska's witness, referenced the requirement of 47 C.F.R. Part 36.154(c) that 25% of loop costs shall be assigned to the interstate jurisdiction. Thus, consistent with such assignment of costs, only 75% of Federal High-Cost Loop support should be included in the intrastate earnings calculation (as is current practice). To impute 100% of interstate support would result in "a mismatch of revenues and expenses."<sup>45</sup>

Not only would the imputation of 100% of Federal High-Cost Loop support to the intrastate jurisdiction be improper, but further, Ms. Vanicek offered testimony that it would be inappropriate to impute ICLS or LSS support in the calculation of NUSF High Cost Program support. In particular, Ms. Vanicek noted that the FCC established ICLS and LSS to recover costs formerly embedded in interstate access rates (that is, the carrier common line charge which included a portion of the transport interconnection charge ("TIC") and local switching rates) from explicit support funds.<sup>46</sup> Further, IAS provides support that was also formerly associated with interstate access and thus, is not properly imputed to the intrastate jurisdiction.<sup>47</sup> Since the NUSF High Cost Program is designed to support only the loop,<sup>48</sup> it is inappropriate to impute federal universal support associated with switching costs to the calculation of NUSF High Cost

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<sup>44</sup>T. 288:9-17.

<sup>45</sup> Ex. 20, at p. 5.

<sup>46</sup> Ex. 12, 6:33-7:2.

<sup>47</sup> T. 313:22-25.

<sup>48</sup> See, *NUSF-26 Order*, para. 13.

Program support provided to Nebraska ETCs.<sup>49</sup> In summary, Ms. Vanicek testified as follows regarding FUSF imputation:

The remaining FUSF support [in addition to 75% of High Cost Loop Support] received by rural carriers is allocated to the interstate jurisdiction. And the costs associated with the support mechanisms have also been allocated to the interstate jurisdiction.

Therefore, the RIC believes it's inappropriate to impute the support received for mechanisms that support interstate costs to the intrastate jurisdiction.<sup>50</sup>

The Companies also believe that the Commission must consider the policy underpinnings of Federal USF programs. The FCC has indicated with regard to universal service support that “. . . the primary federal role is to enable reasonable comparability among states (i.e., to provide states with sufficient support so that states can make local rates reasonably comparable among states), and the primary role of each state is to ensure reasonable comparability within its borders. . . .”<sup>51</sup> The federal universal service support mechanism is designed to cover costs that substantially exceed the national average.<sup>52</sup> By calculating support in this manner, no state should face rates that are significantly higher than states elsewhere.<sup>53</sup> Because federal support is intended to address local rate differences between states, it would be inappropriate to consider all such support in determining NUSF support requirements, as NUSF support should be calculated to ensure reasonable rate comparability among carriers in Nebraska.

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<sup>49</sup> T. 314:1-17.

<sup>50</sup> T. 288:24-289:7.

<sup>51</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306 (“*Ninth Report and Order on Universal Service*”) (rel. Nov. 2, 1999) at para. 38.

<sup>52</sup> Id. at para. 25.

<sup>53</sup> *Ibid.*



If the Commission were to impute federal universal service support amounts received by rural Nebraska ETCs in addition to the current 75% of Federal High-Cost Loop support into its calculation of NUSF support requirements, it would be relying on federal universal service support mechanisms to fund a portion of the NUSF support requirement. Such action would be contrary to Section 254(f) of the Act which states in part “[a] state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards *that do not rely on or burden Federal universal service support mechanisms.*” (emphasis added)

Witnesses representing not only the Companies, but also Embark, the Rural Telecommunications Coalition of Nebraska, Frontier of Nebraska and Qwest oppose the *NUSF-50 Proposal* to impute Federal USF support into the calculation of High Cost Program support to Nebraska ETCs through an adjustment to companies’ earnings.<sup>54</sup>

Based upon the foregoing, the Companies advocate that the existing practice of imputation of 75% of Federal High-Cost Loop support in the NUSF-EARN form calculation of Nebraska ETCs’ High Cost Program support should continue without change, and no additional federal USF support should be imputed to the calculation of High Cost Program support provided to rural Nebraska ETCs.

## **VII. Conclusion**

The Companies advocate that based upon the evidence and reasoning set forth above, the *NUSF-50 Proposal* should be rejected by the Commission. As an alternative to the *NUSF-50 Proposal*, the Companies recommend that the Commission find:

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<sup>54</sup> See, Ex. 18, Harper Direct Testimony, 7:12-8:22; Ex. 20, Ruhland Testimony, page 5; and Ex. 23, Kelly Testimony, 8:18-10:2. Qwest’s witness, Peter Copeland, testified that Qwest disagrees with the imputation methodology of the *NUSF-50 Proposal*, but favors imputation of Federal USF support generally. T. 378:22-379:3.

- A. That the *NUSF-50 Proposal* fails to satisfy the Legislature's requirement as expressed in Section 86-323(5) that "[t]here should be specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service," and thus, cannot be implemented;
- B. That the NUSF surcharge should be increased on an emergency basis pursuant to Section 86-328 from its current 5.75% rate to 6.95% of assessable revenues effective January 1, 2007;
- C. That the current local service benchmark of \$17.50 per month should be maintained in accordance with the *NUSF-26 Order*;
- D. That the current state earnings level of 12% should be maintained; and
- E. That the current practice of imputing 75% of a rural Nebraska ETC's Federal High Cost Loop support into the calculation of such company's NUSF High Cost Program support should continue without change, and that no other Federal USF support should be imputed to such calculation.

Respectfully submitted,

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Consolidated Telecom, Inc.,  
Consolidated Telephone Company,  
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Great Plains Communications, Inc.,  
Hartington Telecommunications Co., Inc,  
Hershey Cooperative Telephone Co.,  
K & M Telephone Company, Inc.,  
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## CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2006, the original and five (5) paper copies, together with an electronic copy, of the Post-Hearing Brief of the Rural Independent Companies was served upon Andy S. Pollock, Executive Director of the Commission, by hand-delivery and electronically, and upon the following parties by email:

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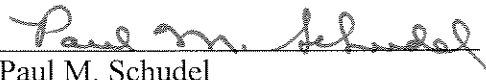
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